IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-253

NOLAN ESTES, ET AL.,

Petitioners,

versus

METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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INDEX

INDEX (Continued)

CITATIONS

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OPINIONS BELOW

The opinions, orders and judgment of the District Court (Estes Pet. App. "B", 4a-129a) are reported in part at 412 F.Supp. 1192. The opinion of the Court of Appeals (Estes Pet. App. "C", 130a-146a) is reported at 572 F.2d 1010.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1978 (App., 16-18). A Petition for Rehearing was denied on May 22, 1978 (Estes Pet. App. "D", 146a-147a). The Petition for Writ of Certiorari was filed on August 14, 1978, and was granted on February 21, 1979. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States provides in pertinent parts as follows:

> ". . . nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Among the issues before the Courts below was the constitutionality of the remedy formulated by the District Court to eliminate the vestiges of a state-imposed dual school system in the large urban school system described in this Brief and by the Courts below. The question presented is:

Whether as to such school systems, the elimination of all one-race schools is the controlling factor to be

considered in determining whether a remedy formulated by the District Court is consistent with the Equal Protection Clause and this Court's decisions in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, and *Milliken v. Bradley*, 433 U.S. 267 (*Milliken II*).

STATEMENT OF THE CASE

This action was brought in the District Court against Petitioners, the members of the Board of Trustees of the Dallas Independent School District and its General Superintendent (the School District), on October 6, 1970, by both Blacks and Mexican-Americans (Respondent-Plaintiffs) asserting de jure segregation of each class and seeking the establishment of a unitary school system for each class.

The School District and the federal courts have been on intimate terms in school desegregation matters since 1955 immediately following *Brown II*. The instant action is not the first, but a second and separate Dallas school desegregation case. At the time the instant action was filed there was also pending in the United States District Court for the Northern District of Texas an existing class action desegregation suit in which continuing jurisdiction is exercised by the District Court and in which the various earlier proceedings involving desegregation of the School District have been determined.[1]

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1 The various proceedings in that action in part may be found at *Bell v. Rippy*, 133 F.Supp. 811 (N.D.Tex., 1955), *Brown v. Rippy*, 233 F.2d 796 (5th Cir., 1956), *cert. denied*, 352 U.S. 878; *Bell v. Rippy*, 146

On June 3, 1971, in a decision entered as a result of an appeal from an order denying the Respondent-Plaintiffs' first motion for preliminary injunction, the Court of Appeals directed the District Court to make full written findings of fact and conclusions of law on the merits of this action in the light of principles enunciated in *Swann. Tasby v. Estes*, 444 F.2d 124 (5th Cir. 1971). The District Court did so in August, 1971. The Respondent-Plaintiffs again appealed.

Almost four years later, on July 23, 1975, the Court of Appeals, among other things, vacated the student assignment plan ordered by the District Court in August of 1971 and remanded with directions to formulate elementary and secondary student assignment plans which comport with the directives of the Supreme Court and that July 23, 1975, Opinion-Mandate of the Court of Appeals. *Tasby v. Estes*, 517 F.2d 92 (5th Cir. 1975), *cert. denied*, 423 U.S. 939.

On August 25, 1975, over the School District's objections, the District Court allowed the Metropolitan Branches of the Dallas N.A.A.C.P. (Respondent-NAACP) to intervene. (August 25, 1975, Order permitting NAACP to Intervene; App., 13-14)

F.Supp. 485 (N.D.Tex., 1956); *Borders v. Rippy*, 247 F.2d 268 (5th Cir., 1957); *Rippy v. Borders*, 250 F.2d 690 (5th Cir., 1957); *Boson v. Rippy*, 275 F.2d 850 (5th Cir., 1960); *Borders v. Rippy*, 184 F.Supp. 402 (N.D.Tex., 1960); *Boson v. Rippy*, 285 F.2d 43 (5th Cir., 1960); *Borders v. Rippy*, 188 F.Supp. 231 (N.D.Tex., 1960); *Borders v. Rippy*, 195 F.Supp. 732 (N.D.Tex., 1961); *Britton v. Folsom*, 348 F.2d 158 (5th Cir., 1965); and *Britton v. Folsom*, 350 F.2d 1022 (5th Cir., 1965).

On February 2, 1976, trial on fashioning a student assignment plan once again commenced in the District Court. This trial lasted five weeks, 44 witnesses testified and there were 145 exhibits admitted into evidence. Besides the initial parties Plaintiffs and the School District, six Intervenors participated: (1) Curry, et al, (2) Maxwell, (3) Brinegar, et al, (4) Strom, et al-Oak Cliff, (5) Strom, et al-Pleasant Grove, and (6) the NAACP-Intervenors. In addition the tri-ethnic Educational Task Force of the Dallas Alliance as Amicus Curiae participated and presented evidence. There were six student assignment plans before the Court prior to the District Court's March 10, 1976, Opinion and Order (Estes Pet. App. "B", 4a-44a), including a plan developed by the Court's own appointed desegregation expert, Dr. Josiah C. Hall, who has been associated with the University of Miami Desegregation Consulting Center. After March 10, 1976, and prior to the April 7, 1976, Final Order there was yet a seventh plan before the Court. This was a plan developed by the School District pursuant to the District Court's March 10, 1976, Opinion and Order directing the School District to set forth the specifics of the Amicus Curiae concept proposals presented to the District Court. This trial culminated in the District Court's April 7, 1976, Final Order, as supplemented, and it is from such April 7, 1976, Final Order, as supplemented, that the appeal to the Court of Appeals arose. The District Court's April 7, 1976, Final Order (Estes Pet. App. "B", 53a-120a), as supplemented (Estes Pet. App. "B", 121a-129a), containing the remedy formulat-

ed by the District Court and here in question, will hereafter be referred to as the Final Order.

Both Courts below have correctly recognized the urban metropolitan nature of the School District and that the School District is not a small rural school system but is the eighth largest urban school district in the United States.

As to Mexican-American students the District Court specifically found in a July 16, 1971, Memorandum Opinion (Brinegar Pet. App. A, A-1-A-6), that the Plaintiff Mexican-Americans failed to maintain their burden of proof to show that there had been some form of de jure segregation against Mexican-American students. However, the District Court by that same order of July 16, 1971, directed that Mexican-American students be considered as a separate ethnic group and a "minority" for purposes of a desegregation plan. Hence in the School District the problem exists of formulating a tri-ethnic remedy and the phrase "Anglo" is used in lieu of "white" under such circumstances. *Tasby*, 517 F.2d at 106.

There is no actual total population census of the School District. The boundaries of the City of Dallas and the School District are not coterminous. The population of the City of Dallas is 800,000 to 900,000. The ethnic composition of the total population of the School District, as distinguished from student enrollment, approximates the ethnic composition of the population of

the City of Dallas which is estimated to be 25% or 30% Black, 10% to 15% Chicano and the remainder Anglo. (R. Vol. I, 279, 405, 406; App., 36-37, 37-39) This is far different from the ethnic composition of the student population of the School District.

In 1975 the student population of the School District was 41.1% Anglo, 44.5% Black, 13.4% Mexican-American and 1% "other." (Def. Ex. 11, pp. 1, 2; R. Vol. I, 63, 64; App., 222-223, 21-23) The Court is advised that as of March 1, 1979, the student population of the School District was 33.50% Anglo, 49.11% Black, 16.37% Mexican-American and 1.03% "other." This enrollment pattern then at the time of preparation of this brief would be as follows:

	December 1, 1975		March 1, 1979	
	Number	Percent	Number	Percent
Anglo	58,023	41.1	44,766	33.50
Black	62,767	44.5	65,637	49.11
Mexican-American	18,889	13.4	21,876	16.37
Other	1,443	1.0	1,369	1.03
	141,122		133,648	

At the time of trial on February 2, 1976, the School District had lost approximately 40,000 Anglo students during the pendency of this second action. As the students become younger there is a decided drop in the number and percentage of Anglo students. (Def. Ex. 13, R. Vol. I, 71; Def. Ex. 11, pp. 1, 2, R. Vol. I, 63, 64; App., 224-225, 25-26, 222-223, 21-23)

Defendants' Exhibit 13, which reflects the historical enrollment of the School District, is as follows:

HISTORICAL ENROLLMENT*

Dallas Independent School District

Dates	Anglo	Percent	Negro	Percent	Mexican-American	Percent	Total
October, 1969-70	97,131		52,531		13,606		
Kindergarten	- 28		- 271		- 94		
Total	97,103		52,260		13,512		162,875
October, 1970-71	95,133		55,648		13,945		
Kindergarten	- 121		-1,036		- 216		
Total	95,012	- 2.2	54,612	+ 4.5	13,729	+ 1.6	163,353
October, 1971-72	86,548		57,394		15,154		
Kindergarten	- 66		-1,455		- 269		
Total	86,482	- 9.0	55,939	+ 2.3	14,885	+ 8.4	157,306
October, 1972-73	78,560		59,643		15,909		
Kindergarten	- 126		-2,383		- 514		
Total	78,434	- 9.3	57,260	+ 2.4	15,395	+ 3.4	151,089
October, 1973-74	73,042		62,468		17,141		
Kindergarten	-3,439		-3,575		-1,276		
Total	69,603	- 11.3	58,893	+ 2.9	15,865	+ 3.1	144,361

* HEW Report

(Continued below)

Dates	Anglo	Percent	Negro	Percent	Mexican-American	Percent	Total
October, 1974-75	67,324		63,760		18,426		
Kindergarten	-3,821		-4,105		-1,562		
Total	63,503	- 8.8	59,655	+ 1.3	16,864	+ 6.3	140,022
October, 1975	60,796		64,594		18,994		
Kindergarten	-3,370		-4,338		-1,559		
Total	57,426	- 9.6	60,256	+ 1.0	17,435	+ 3.4	135,117
1969-70	97,103		- 52,260		- 13,512		
1975	- 57,426		60,256		17,435		
Total Loss	39,677	- 40.9	7,996	+ 15.3	3,923	+ 29.0	

Since kindergarten attendance was not mandatory during the entire period shown on this exhibit, appropriate adjustments have been made and the calculations based on Grades 1-12.

The ethnic make-up by grade level of the School District as of December 1, 1975, was: (Def. Ex. 11, pp. 1, 2; App. 222-223)

Grade Level	Anglo	%	Black	%	Mexican-American	%	Other	%	Total
K	3254	34.8	4429	47.3	1595	17.0	87	.9	9365
1	4260	36.7	5274	45.5	1955	16.9	113	1.0	11602
2	4095	36.9	5080	45.7	1822	16.4	104	1.0	11101
3	3947	36.7	5056	46.9	1648	15.3	118	1.1	10769
4	3756	35.5	5098	48.1	1608	15.2	131	1.2	10593
5	4226	37.5	5251	46.6	1672	14.8	125	1.1	11274
6	4543	39.3	5394	46.6	1504	13.0	128	1.1	11569
7	4853	41.0	5356	45.2	1532	12.9	103	.9	11844
8	5039	42.2	5343	44.8	1438	12.1	115	1.0	11935
9	5231	43.5	5406	45.0	1286	10.7	100	.8	12023
10	5287	45.4	4943	42.5	1259	10.8	155	1.3	11644
11	4828	51.5	3526	37.5	936	10.0	93	1.0	9383
12	4704	58.7	2611	32.6	634	7.9	71	.8	8020
TOTAL	58023	41.1	62767	44.5	18889	13.4	1443	1.0	141122

The School District estimates that in 1980 the percentage of Anglo enrollment will be 26%, that Black enrollment will be 57% and that Mexican-American enrollment will be 18%. (R. Vol. I, 67, 68; App., 23-24, 24-25)

The School District contains approximately 351 square miles within the 900 square miles of Dallas County. From the School District's most northerly point to its most southerly, there is a distance of approximately 35 miles viewed from the northwest to the southeastern part of the district. It is about 25 miles from what is called the southwest quadrant in Oak Cliff just below Hulcy Junior High School to the northernmost point near the Dallas County line. (R. Vol. I, 405; App., 37-38)

In addition to being faced with the task of fashioning a remedy for an ever increasing *minority Anglo* school system, the District Court also had the problem of preserving naturally integrated areas and schools which had become naturally integrated due to changing housing patterns. All of the plans before the Court submitted by all of the parties, the Amicus Curiae and the Court's desegregation expert recognized and accepted the concept that there was no reason to disturb already desegregated neighborhood schools. Each plan proposed to leave certain areas and schools alone as they were naturally integrated. (R. Vol. I, 104, 105; Hall's Ex. 5, pp. 14-19, R. Vol. IV, 123; R. Vol. IV, 129, 130; NAACP Ex. 2, p. 6, R. Vol. IV, 6; R. Vol. IV, 15, 16, 19;

Pl. Ex. 16, pp. 9, 41, R. Vol. III, 231, 243; R. Vol. III, 241-242, 259, 330, 355, 406, 410; App., 33-35, 251-259, 100-101; 102-103, 230, 92-93, 93-95, 95-96, 237-238, 248-249, 70-71, 73-74, 71-72, 74-75, 75-76; 76-77, 86-87, 89-90)

Further the District Court had to consider the location within the School District of these naturally integrated areas and schools in relationship to those areas containing the remaining predominantly Anglo students and those areas containing predominantly Mexican-American or Black enrollment. The area containing the only remaining predominantly Anglo students lies generally in a strip along the northern and certain eastern sections of the system. The predominantly Mexican-American or Black students reside to the south and southeast in areas distant from the predominantly Anglo students. Separating the remaining predominantly Anglo students and the predominantly Mexican-American or Black students are large portions of the naturally integrated areas and schools. (Def. Ex. 2, R. Vol. I, 77, 85; Def. Ex. 3, R. Vol. I, 81, 85; R. Vol. I, 77, 78, 79, 80, 81; App., 220, 27-28, 31-33, 221, 30-31, 31-33, 27-28, 28, 29, 29-30, 30-31)

Defendants' Exhibit 1 reflects the Black and white racial composition of the student population by residential patterns in the year 1960. The orange area shows the residential location of Black students in the year 1960. The yellow area shows the residential location of white students in the year 1960. In 1960 separate statistics were not kept as to Mexican-American students and Mexican-American students were counted as "white." In 1960 Mexican-American students were located in the area of the present Travis Elementary School and the Juarez and Douglass Elementary Schools. To that extent the Mexican-American student population in 1960 would be shown in the yellow area on Defendants' Exhibit 1. (R. Vol. I, 76; App., 26-27)

Defendants' Exhibit 2 reflects the current residential patterns of students in the School District. The yellow zone on that map reflects the only remaining predominantly white students, the pink zone is the naturally integrated area representing minority and Anglo, and the dark orange on that map represents predominantly Mexican-American or Black enrollment. (R. Vol. I, 77, 78; App., 27, 28)

Defendants' Exhibit 3 reflects the growth over the period 1960, 1965 and 1970 of the growing Black scholastic population within the School District, as well as the areas of the School District that in 1975 were composed of at least 25% Black students, the areas that in 1975 were at least 25% Mexican-American and the areas that in 1975 were at least 25% minority combined, i.e., 25% of both Black and Mexican-American. (R. Vol. I, 80, 81; App., 29-30, 30-31)

In its July 23, 1975, Opinion-Mandate the Court of Appeals made reference to the "endurance record perhaps, but not speed records" set with respect to

desegregation litigation concerning the School District. *Tasby*, 517 F.2d at 109. The Court of Appeals there also observed "The DISD is no stranger to school desegregation proceedings before this Court." *Id.* at 95.

If there is one overriding concern of the School District, it may be fairly said to be that the School District would indeed like to become a stranger to school desegregation proceedings. To that end, and given the origin and development of what became the provisions of the District Court's Final Order, the School District supports the District Court's Final Order and asks that it be affirmed in its entirety by this Court.

During the course of hearings in the District Court commencing February 2, 1976, the descriptive terminology of "student assignment" provisions and "non-student assignment" provisions developed. As used, non-student assignment provisions involved judicial remedies in desegregation proceedings going beyond student assignment plans and pertaining to (a) the operation and management of the business and affairs of the School District, and (b) the education, curriculum and program aspects of the School District.

On September 16, 1975, the District Court in a public hearing expressed great dissatisfaction with both a desegregation plan proposed by the School District and a plan proposed by the Respondent-NAACP. The District Court went on to point out that this was a community-wide problem that involved all segments of

the city. (R. September 16, 1975, Hearing on Plaintiffs' Motion for Further Relief, 83-91; App., 198-204) As a result of the District Court's comments, there came to be presented to the District Court certain concept proposals of an organization known as the Educational Task Force of the Dallas Alliance. It was from such concepts that the Final Order originated.

The Educational Task Force of the Dallas Alliance is a tri-ethnic group. A description of how the Educational Task Force of the Dallas Alliance came into being and how its concepts came to be presented to the District Court is summarized below.

There exists in the City of Dallas a community service organization known as the Dallas Alliance to act upon urban issues. A description of the Dallas Alliance and its activities during and preceding the trial commencing February 2, 1976, follows.

The Dallas Alliance was composed of a board of forty trustees. (R. Vol. V, 50, 51; App., 132, 133) Of these forty persons, eleven were Black, four were Mexican-American, one was American Indian and the remainder were Anglo. (R. Vol. V, 226, 227; App., 153-154, 154-155) In addition the Dallas Alliance had 77 cooperating or corresponding organizations with whom it communicated and received views and information. (R. Vol. V, 52, 53; App., 133-134, 134-135) Prior to instituting its Educational Task Force the Dallas Alliance had two other task forces in operation.

One was on the Criminal Justice System and the second on Neighborhood Regeneration and Maintenance. (R. Vol. V, 54, 55; App., 135, 136) On October 23, 1975, the Dallas Alliance authorized an Educational Task Force of the Dallas Alliance. (R. Vol. V, 59, 61, 62, 388; Def. Ex. 17, R. Vol. V, 387; App., 136-138, 161-162, 226-229, 160-161) Creation of that Task Force came about as follows. Following the District Court's comments of September 16, 1975, a group of twenty citizens, some of whom belonged to the Dallas Alliance and some of whom did not, had constituted themselves together as a committee to look into some matters with respect to education in the School District and to inquire into whether the processes of developing a desegregation plan were possible. (R. Vol. V, 68, 69; App., 142, 143) The committee was made up of six Blacks, seven Mexican-Americans and seven Anglos. (R. Vol. V, 7; App., 125) This committee sought and obtained from the Dallas Alliance status as its Educational Task Force. (R. Vol. V, 61; App., 137-138) Nine persons serving on the committee that then became the Educational Task Force were at that time members of the Dallas Alliance. (R. Vol. V, 64, 65; App., 139-140, 140-141) After the committee became the Educational Task Force of the Dallas Alliance the American Indian member of Dallas Alliance became a member of the Educational Task Force. (R. Vol. V, 65, 66, 69; App., 140-141, 142-143)

On December 18, 1975, the District Court summoned all parties and their attorneys to appear before it and in effect introduced the Educational Task Force to

the parties and indicated strongly its support for their efforts. (R. December 18, 1975, Called Hearing of Judge Taylor, 1-14; App., 205-215) The Educational Task Force of the Dallas Alliance was given a charge by the Dallas Alliance to attempt to design a plan for the school system. (R. Vol. V, 75; App., 143-144) This it set out to do as follows:

The Task Force was assigned the services of the Executive Director of the Dallas Alliance, Dr. Paul Geisel. (R. Vol. V, 2; App., 122-123) Dr. Geisel was on leave of absence from the University of Texas at Arlington where he is a Professor of Urban Affairs. (R. Vol. V, 3; App., 123-124) Dr. Geisel holds a PhD in sociology from Vanderbilt; he did as his doctoral dissertation a study of the educational and aspirational achievement levels of students in the Chattanooga, Tennessee, school system; he has been employed by Tuskegee Institute; and while teaching at the University of Pittsburgh he did an analysis of the Pittsburgh schools in terms of racial achievements and racial integration and was the Educational Chairman of the Allegheny County NAACP. (R. Vol. V, 5; App., 124-125) Dr. Geisel went to work with the Educational Task Force of the Dallas Alliance in the middle of October, 1975. (R. Vol. V, 21; App., 128) Upon obtaining status as the Educational Task Force of the Dallas Alliance that Task Force met on a regular basis every Tuesday evening for an extended period until about December 16, 1975. (R. Vol. V, 22; App., 128) The Task Force was first briefed by school personnel and by city officials. Thereafter Dr.

Geisel traveled throughout the country to meet with various leading figures in the field of desegregating public schools. (R. Vol. V, 22; App., 128) In the course of this work Dr. Geisel personally saw, or spoke from his office by telephone with, approximately thirty different people. Dr. Geisel talked by telephone extensively with people in Atlanta, Charlotte-Mecklenburg and Jacksonville, Florida. When Dr. Geisel returned to Dallas from his travels, he made a report to the Educational Task Force on the kinds of ideas and processes used to desegregate schools and the kinds of issues that are involved. (R. Vol. V, 22; App., 128) On Tuesday evening, December 16, 1975, the Task Force heard Dr. Geisel's report and developed guidelines for him to follow. Dr. Geisel was then given until January 6, 1976, to attempt to formulate, develop and flesh out what the proposals would look like if they were turned in as proposals for a desegregation plan. (R. Vol. V, 23; App., 129)

The Task Force then began meeting on Tuesday nights as well as on Saturdays, and in many instances on Sundays. Altogether the Task Force spent about 1,500 hours together. (R. Vol. V, 23; App., 129)

The Task Force came to a consensus, to a community of the mind, and they came to understand what each member was attempting to achieve through his or her participation. (R. Vol. V, 24; App., 129-130) On Monday, February 16, 1976, the Educational Task Force went to the District Court and presented its plan. (R.

Vol. V, 24; App., 129-130) The "consensus" of the Task Force was much more than a bare majority. The initial proposal submitted to the District Court reflected the support of nineteen of the twenty-one members. (R. Vol. V, 102; App., 144-145) Sixteen members of the Task Force were present at the time their proposals were submitted to the District Court on February 16, 1976. (R. Vol. V, 104; App., 145-146)

The Task Force consulted with some thirty experts. The Task Force was interested in talking to people who were skilled in the field of education and skilled in the field of desegregation. Most of these people were contacted personally by Dr. Geisel. In rare instances the consultants dealt directly with the Task Force members themselves. (R. Vol. V, 369, 370; App., 155-156, 156-157)

Persons contacted on behalf of the Educational Task Force were: Dr. Jose Cardenas (also the Plaintiffs' witness); Dr. Horacio Ulibarri (from New Mexico); Dr. Robert Green, Dean of the College of Urban Development at Michigan State; Dr. Harold Gores, Educational Facilities Laboratory; Dr. Frank Rose, Executive Director of the Lamar Society of the University Associates in Washington; Dr. Thomas Pettigrew, then on leave from Stanford University; Dr. Rudolpho Alvarrez, Professor of Sociology in Chicano studies at U.C.L.A.; Wilson Riles, State Superintendent of Public Instruction in California; Davis Campbell, Assistant to the State Superintendent of Public Instruction of

California; Marion Joseph, Assistant to the State Superintendent of Public Instruction of California; Ray Martinez, Superintendent of Instruction at Pasadena, California; Jim Taylor and Ron Prescott, officials in the Los Angeles School District; Robert Nicewander, United States Office of Education; Marshall Smith of the National Institute of Education; Dennis Doyle, National Institute of Education; Jack Troutman, a local consultant; Dr. Julius Truelson, former president of the Great Cities School System and former Superintendent of Schools, Fort Worth Independent School District; Research and superintendent's staff, Fort Worth Independent School District; School Superintendent of Sacramento, California; School Superintendent of San Francisco Schools; School Superintendent of Charlotte, North Carolina; City Planning Department of the City of Dallas; Dr. Leon Lessinger, Dean of the College of Education of the University of South Carolina. (R. Vol. V, 370-372; App., 156-158)

While the Task Force did examine the school systems in a good many cities, it did not try to imitate or copy any other city. The Task Force tried to come up with something unique for the total city of Dallas. (R. Vol. V, 373, 374; App., 158-189, 159-160)

Following the Task Force presentation to the District Court on Monday, February 16, 1976, that Court on Tuesday, February 17, 1976, submitted the Task Force's proposals to the parties and announced that the Educational Task Force of Dallas Alliance would be rec-

ognized by the Court as Amicus Curiae. The Court then asked the parties to study these proposals and report back their reactions. The reactions of the Respondent-Plaintiffs, the School District and the Respondent-NAACP were unfavorable to various aspects of the proposals. (R. Vol. IV, 295-317; App., 104-121) The Court then called Dr. Geisel to the stand as the Court's witness and the Task Force proposals were introduced in evidence. (R. Vol. V, 8, 9; App., 126-127) On March 3, 1976, the Task Force filed its modified proposals (R. Vol. IX, 363; App., 196-197) A member of the Task Force was called by the Court as the Court's witness to testify concerning the modified proposals. (R. Vol. IX, 361; App., 196)

It was the concepts in these March 3, 1976, modified proposals which the District Court adopted in two preliminary orders. The District Court directed the School District to set forth in writing the specifics of these modified proposals. In this connection the District Court's March 10, 1976, Opinion and Order provided: (Estes Pet. App. "B", 41a)

> "Accordingly, it is ORDERED by the Court that the modified plan of the Educational Task Force of the Dallas Alliance filed with the Court on March 3, 1976, is hereby adopted as the Court's plan for removal of all vestiges of a dual system remaining in the Dallas Independent School District, and the school district is directed to prepare and file with the

> Court a student assignment plan carrying into effect the concept of said Task Force plan no later than March 24, 1976."

and the District Court's March 15, 1976, Supplemental Order provided: (Estes Pet. App. "B", 45a, 46a)

> "During the process of fleshing out the Court's Order of March 10, 1975, some questions have arisen regarding the Court's adoption of the Dallas Alliance's plan. So that there is no misunderstanding in this regard, the Court intended by the order of March 10 to adopt the *concepts* suggested by the plan of the Educational Task Force of the Dallas Alliance. The staff of the school district shall take these concepts and adapt them to fit the characteristics of the Dallas Independent School District. The Court recognizes that during this process, a certain amount of flexibility is necessary. The Court expects the school district to put into effect the concepts of the Dallas Alliance plan. The specifics of the desegregation plan for the DISD will be embodied in the Court's Final Order which will be entered in approximately two weeks."

Obedient to the District Court's orders, the School District on March 24, 1976, on March 29, 1976, and on April 1, 1976, filed with the Court three separate documents representing its efforts to set forth the

specifics of the modified proposals of the Educational Task Force of the Dallas Alliance.

On April 7, 1976, the District Court in its Final Order fashioned and directed the remedy thought to be necessary by that Court to eliminate the vestiges of a dual school system in the School District. In the District Court's language introducing that remedy: (Estes Pet. App. "B", 47a)

> "The Court has received and thoroughly considered suggestions made by various intervenors and by the Amicus Curiae Educational Task Force of the Dallas Alliance subsequent to the submission of the DISD's student assignment plan on March 24. The Court is of the opinion that many of these suggestions have merit and should be reflected in the student assignment plan. The Court has thus modified the document submitted by the DISD to incorporate many of these suggestions. It has further incorporated modifications necessary in order that the spirit of the Dallas Alliance's plan will be implemented to the fullest extent possible. These changes appear in the Final Order entered this day."

The District Court's Final Order constitutes a judicial sanction of the heart of a compromise reached by a tri-ethnic group of citizens. The concepts pro-

posed to the District Court by the Educational Task Force of the Dallas Alliance represent a compromise arrived at in the eleventh hour in which the hard bargain was struck between a student assignment plan which might be briefly summarized as providing (a) a somewhat "neighborhood" approach to schools for grades K-3 and 9-12, and (b) judicially forced integrated 4-6 grade centers and 7-8 grade centers requiring busing, and (c) unique and special districtwide vanguard schools for grades 4-6, academy schools for grades 7-8, and magnet schools for grades 9-12, on the one hand; and on the other hand, increased participation by minorities in the day-to-day running of the School District by virtue of the 44% Anglo, 44% Black and 12% Mexican-American ethnic ratio applicable to the top salaried administrative positions in the School District, then established at 142 in number (R. Vol. V, 133-137, 213-215; App., 146-150, 151-153)

Respondents Plaintiffs and NAACP have opposed and objected to only the *student assignment* portions of the District Court's Final Order. These Respondents want both massive busing in a now minority Anglo school district as well as the imposition upon the School District of federal court orders involving the federal judicial system in (a) the operation and management of the business and affairs of the School District, and (b) the education, curriculum and program aspects of the School District.

Implementation of the District Court's Final Order commenced in August of 1976 with the opening of the

1976-77 school year. Thereafter, on October 11, 1976, the Board of Education of the School District unanimously adopted an order calling an election to be held December 11, 1976, on the proposition of whether the Board be authorized to issue bonds in the amount of $80,000,000.00 for the purpose of the construction and equipment of school buildings in the School District and the purchase of necessary sites therefor. That Board of Education was, and still is, composed of nine members. These School Trustees were not elected "at large," but rather each was elected from single-member trustee districts fairly apportioned. The Board is composed of six Anglos, two Blacks and one Mexican-American. (R. February 24, 1977, Hearing of Defendants' Motion for Approval of Site Acquisition, School Construction and Facility Abandonment, 5, 6; R. Vol. II, 54, 58-60; App., 216-217, 40, 41-43)

On December 11, 1976, the voters in the School District — including the voters in the East Oak Cliff Subdistrict — voted in favor of this $80,000,000.00 school improvement bond issue. In the East Oak Cliff area there were 3,000 votes for the bond issue and only 300 or 400 votes against this bond issue. The bond issue also carried by an overwhelming majority in South Dallas which is also a predominantly black area in the School District. (R. February 24, 1977, Hearing of Defendants' Motion for Approval of Site Acquisition, School Construction and Facility Abandonment, 6, 7; App., 217-218)

All parties essentially agree that the time and distance students must spend on buses together with traffic congestion prevent transportation of students between what is identified by the District Court as the virtually all-black East Oak Cliff area and the area containing the remaining Anglos in the strip along the north and east portions of the School District. All plans before the District Court except Respondent-Plaintiffs' Plan A left all or portions of this East Oak Cliff area with one-race schools. Even then Respondent-Plaintiffs did not seriously urge their Plan A to the District Court.

Respondent-Plaintiffs' expert witness, Dr. Charles V. Willie, testified:

> "Yes, I made time studies of how long it would take to go from the tip end of North Dallas to Oak Cliff and *I found that to be an exceedingly long distance.* But I don't think that the School Districts have to be laid out that way." (Emphasis ours) (R. Vol. III, 134; App., 51)

Respondent-Plaintiffs' witness and lead counsel, Mr. Edward B. Cloutman, III, testified concerning their only effort at a time and distance study as to which evidence was presented:

> "A. It's the one next to the Dealey zone. I think that one we that we made was at least

> about thirty-four, thirty-five minutes and it took — it was about twenty-two miles."
>
> * * *
>
> "Q. . . . What route did you take?
> "A. We took a, I believe, east-west major street. I believe Royal Lane, to the Tollway, south to I-35, I-35 to I believe Ledbetter on the southern end, Ledbetter east — I've forgotten the street name. It's the same street that the Veteran's Hospital is on, turning north and then to the school.
> "Q. What time of day?
> "A. It was about *noon.*
> "Q. What day of the week?
> "A. It was *on a Sunday.*" (Emphasis ours) (R. Vol. III, 375, 376; App., 79-80)

The Court's witness, Dr. Paul Geisel, testified:

> "Q. And you left South Oak Cliff. Now, as I would look at that map, it would leave South Oak Cliff all black, I believe that would be.
> "A. Essentially.
> "Q. What was the reason — was there any reason for that?
> "A. The reason that had to do with two components, I believe. One was the issue of attempting to — *not to do cross town busing or do busing that required a travel time of greater than thirty minutes . . .*" (Emphasis ours) (R. Vol. V, 49; App., 130-131)

In three separate places Respondent-Plaintiffs' Plan B states the reason for leaving black one-race schools in the East Oak Cliff Subdistrict. In the thrice repeated language of Plaintiffs: (Pl. Ex. 16, pp. 34, 36, 38, R. Vol. III, 231, 243; R. Vol. III, 376, 377; App., 239-240, 241-243, 243-245, 70, 73-74, 80)

> "*Distance* from the majority white areas, capacity of schools, *DISD enrollment patterns* and generally good physical facilities were factors resulting in South Oak Cliff retaining its present student assignment patterns." (Emphasis ours)

The "South Oak Cliff" referred to is the area now referred to as East Oak Cliff in the District Court's Final Order. By Respondent-Plaintiffs' own admission in their Plan B, and by their own attorney-witness's testimony, the long distance of the East Oak Cliff Subdistrict from areas containing white students is so great that the continued existence of black one-race schools in East Oak Cliff is justified. (R. Vol. III, 378, 379; App., 81-82, 82-83) Respondent-Plaintiffs also admit in their Plan B, and by their own attorney-witness's testimony, that the "enrollment patterns" in the School District, i.e., an ever expanding scholastic population in East Oak Cliff, the number of Black students and the number of Anglo students in the School District and the absence of Anglo student growth in the School District, further justify the continued existence of black one-race schools in East Oak Cliff. (R. Vol. III, 379-381, 407, 408; App., 82-84, 87-88, 88-89)

Respondent-Plaintiffs, by motions filed in the District Court on April 2, 1976, and April 5, 1976, sought an award of attorneys' fees in this action under Section 718 of the Education Amendments Act of 1972 on the theory that they were the "prevailing party." On April 30, 1976, Respondent-Plaintiffs filed a brief in support of their motion for attorneys' fees which contained the following statement: (April 30, 1976, Brief in Support of Motion for Attorneys' Fees and Costs, p. 4; App., 14)

> "Finally, the plan adopted by the Court in its order of March 10, 1976, together with Supplemental Opinion and Orders dated April 7, 1976, and April 15, 1976 adopt and/or incorporate almost every precept proposed by plaintiffs for student assignment and non-student assignment features of the remedy."

The District Court recognized that the Respondent-Plaintiff Black and Mexican-American students obtained all of the student assignment and non-student assignment relief they proposed and sought. The District Court in its Order dated July 20, 1976, awarding attorneys' fees and costs to Respondent-Plaintiffs, pointed out: (July 20, 1976, Memorandum Opinion, p. 3; App., 15)

> "Finally, the plan adopted by the Court on March 10, 1976, and Ordered to be implemented on April 7, 1976, and April 15, 1976, incorporated almost every precept proposed

by plaintiffs for both student assignment and non-student assignment remedies."

Respondent-Plaintiffs filed two plans with the District Court on January 12, 1976. Respondent-Plaintiffs' Exhibit 16 contains both plans, one of which is identified as Plan A and one as Plan B. Prior to the filing of the School District's brief in the Court of Appeals Respondent-Plaintiffs' counsel, Mr. Edward B. Cloutman, III, advised counsel for the School District that Respondent-Plaintiffs did not intend to urge either of Respondent-Plaintiffs' Plans A or B in this case. Respondent-Plaintiffs did not urge either of their plans in the Court of Appeals. Both of Respondent-Plaintiffs' plans have been abandoned by Respondent-Plaintiffs in this action.

Various approaches in Respondent-Plaintiffs' two plans support the student assignment plan contained in the District Court's Final Order. Both Plaintiffs' Plans A and B proposed to leave certain areas and schools of the School District alone as those areas and schools were naturally integrated. Respondent-Plaintiffs' testimony admits that under Plaintiffs' Plan A, 13 elementary schools were considered desegregated and were left alone as being naturally integrated. Plaintiffs' testimony admitted that under Plaintiffs' Plan B, 41 elementary schools were considered desegregated and were left alone as being naturally integrated. (Pl. Ex. 16, pp. 9, 41, R. Vol. III, 231, 243; R. Vol. III, 241, 242, 259, 330, 355, 406, 410; App., 237-238, 248-249, 70-71, 73-74, 71-72, 74-75, 75-76, 76-77, 86-87, 89-90) The

concept of leaving certain areas and schools of the School District alone for the reason that those areas and schools were naturally integrated is a part of the student assignment plan contained in the District Court's Final Order.

Both Respondent-Plaintiffs' Plans A and B proposed magnet schools, some districtwide and some serving smaller parts of the School District. As shown in the Overview to Respondent-Plaintiffs' Plans A and B, Respondent-Plaintiffs recommend that all magnet schools should be constructed in the inner-city area to encourage the inward flow of students, and particularly white students, and that these schools should seek the assistance of local businesses and citizens in order to acquire appropriate construction sites. Respondent-Plaintiffs suggest that student enrollment in such magnets should approximate the ethnic enrollment of the School District as a whole with exceptions for the elementary magnets created under Plan B. (Pl. Ex. 16, pp. 2, 39, R. Vol. III, 231, 243; R. Vol. III, 371, 372, 382, 383; App., 234-236, 245-247, 70-71, 73-74, 77-78, 78-79, 84-85, 85-86)

This concept of magnet schools and their location in the minority or inner-city areas to encourage the inward flow of students, and particularly white students, with the participation of the business community and student enrollment approximating the ethnic enrollment of the School District as a whole is a part of the student assignment plan contained in the District Court's Final Order.

Respondent-Plaintiffs' Plan B leaves some virtually all-black schools in what has become known as the East Oak Cliff Subdistrict. Under Respondent-Plaintiffs' Plan B there are 12 elementary schools, two junior high schools and one high school that are black one-race schools in East Oak Cliff. Respondent-Plaintiffs' Plan B also leaves two all-black elementary schools in West Dallas. These are Allen and Lanier. Respondent-Plaintiffs' Plan B also leaves Dunbar an all-black elementary school in South Dallas. (R. Vol. III, 378; App., 81-82) Thus Respondent-Plaintiffs' Plan B leaves 15 all-black elementary schools, two all-black junior high schools and one all-black high school.

Throughout, Respondent-NAACP has insisted that the existence of some one-race schools invalidates the student assignment portion of the remedy. However, Respondent-NAACP publicly admits it does not have a solution. In a newspaper interview this public admission was made by the attorney of record for the Respondent-NAACP:

> "And even the NAACP admits that it is having some trouble finding a way to break up the all-black nature of the subdistrict. 'If I knew the answer, I'd give it to you,' says NAACP attorney E. Brice Cunningham. 'I admit that we have not yet come up with an alternative to some all-black schools. But we will still challenge it in court.' " Dallas Morning News, August 15, 1976, at 1, col. 2.

Respondent-NAACP demands racial balance in each school and year-by-year adjustments in such quota assignments. The Respondent-NAACP plan states:

> "(a) Every school should have a *racial balance* comparable to the *racial balance* in the District, which will not deviate more than Ten Percent (10%) up or down." (Emphasis ours) (NAACP Ex. 2, p. 7, R. Vol. IV, 6; App., 231, 92-93)
>
> * * *
>
> "2. The first magnitude of desegregation and the attaining of an Unitary School System should be to *achieve* a *racial balance* of *black* and *white* students in each school and then follow through with the integration of other minorities into the system." (Emphasis ours) (NAACP Ex. 2, p. 7, R. Vol. IV, 6; App., 231, 92-93)
>
> * * *
>
> "5. Any set plan should have written into it automatic mechanisms for change based upon conditions which may arise in the community." (NAACP Ex. 2, p. 7, R. Vol. IV, 6; App., 232, 92-93)
>
> * * *
>
> "13. Monitoring procedures are to be so specified that assignment adjustments will be acted upon when trends of racial changes are noted. These procedures are to be made spe-

cific with respect to degrees of change and timing of remedial actions to be taken." (NAACP Ex. 2, p. 8, R. Vol. IV, 6; App., 233, 92-93)

During the course of the trial Mr. E. Brice Cunningham, Respondent-NAACP's lead attorney, on February 19, 1976, advised the Court as follows concerning the propriety of leaving grades K-3 in their current neighborhood schools: (R. Vol. IV, 303; App., 109-110)

> "The members of the NAACP can see justification possibly for K through three because we are dealing with young children, the first time in school. I have talked with some teachers and they explained that these kids may lose their or may have problems being there the first time but for nine through twelve there is no justification that we can see."

The Final Order allows grades K-3 to so remain in their neighborhood schools.

The Court of Appeals recognized:

(a) that the School District is the eighth largest urban school district in the country (Estes Pet. App. "C", 131a),

(b) that the School District has been the subject of

desegregation litigation in various actions since 1955 (Estes Pet. App. "C", 132a),

(c) that the primary attack upon the student assignment plan in question is based upon the claim that the plan cannot pass constitutional muster because of the large number of one-race schools it establishes (Estes Pet. App. "C", 132a),

(d) that since 1971 substantial changes have occurred in the School District, residential patterns of Dallas have shifted, many areas are now naturally integrated, what was f.rmerly a majority Anglo school system has become a predominantly minority school system, that in 1971 the school system was 69% (sic 59%) Anglo, and that in 1975 it was 41.1% Anglo, 44.5% Black, 13.4% Mexican-American and 1% "other" (Estes Pet. App. "C", 134a, 135a),

(e) that there may be special considerations involved in devising a school desegregation plan in an urban area with a predominantly minority enrollment that may justify the maintenance of some one-race schools (Estes Pet. App. "C", 134a),

(f) that in devising the plan in question the District Court considered numerous proposals to desegregate the school system, among which were plans submitted by the original Plaintiffs, the NAACP Intervenors, the School District, a Court-appointed expert and a tri-ethnic Amicus Curiae group (Estes Pet. App. "C", 134a), and

(g) that after a voluminous record and holding hearings for over a month on the feasibility and effectiveness of these proposals that the District Court drew a comprehensive plan dealing, *inter alia*, with special programs, transportation, discipline, facilities, personnel, and an accountability system, as well as student assignment (Estes Pet. App. "C", 134a).

At the conclusion of the liability phase of this action on July 16, 1971, (as distinguished from any phase of this case involving the nature and content of any remedial order) the District Court made no findings that any matters pertaining to the operation and management of the business and affairs of the School District or any matters pertaining to the education, curriculum and program aspects of the School District constituted a deprivation by the School District of any rights secured any minority student by the Constitution or laws of the United States. Further, the Court made no findings at the conclusion of the liability phase of this action on July 16, 1971, (Brinegar Pet. App. A, A-1 - A-6) that any student by reason of his or her race, color or national origin had been excluded from participation in, been denied the benefits of, or been subjected to discrimination under any program or activity receiving federal financial assistance as covered by the Civil Rights Act of 1964, including Section 601 of that Act. 42 U.S.C. §2000d.

The Judge of the District Court has presided in this second case from its beginning. From its March 10,

1976, Opinion and Order it is obvious that the District Court has recognized and considered all the many complex factors involved in fashioning a desegregation remedy for the School District. Over the strenuous objections of the School District, the District Court anticipated the subsequent June 27, 1977, decision of this Court in *Milliken II* and ordered comprehensive non-student assignment provisions in the remedy.[2] Summary examples of the non-student assignment requirements included in the District Court's remedy are set out in Estes Petition Appendix "F", 152a-157a.

The Court of Appeals appears to recognize the careful study and consideration that the District Court had given the case and the many complex factors involved in fashioning the remedy. The Court of Appeals even noted that there may be special considerations involved in devising a school desegregation plan in an urban area with a predominantly minority enrollment that may justify the maintenance of some one-race schools. Nevertheless, the Court of Appeals considered the number of one-race schools as controlling and remanded the case to the District Court for the formulation of a new student assignment plan and for findings to justify the maintenance of any one-race schools that may be a part of that plan.

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2 Nothing contained in this brief is to be construed as a waiver by the School District of its right on remand to object to the introduction of all evidence and to all parts of any plan or proposal as might pertain to non-student assignment matters and to object to the inclusion of non-student assignment provisions in any remedial order and the School District specifically reserves its right to so object.

SUMMARY OF THE ARGUMENT

A. In addressing the four specific problem areas with respect to the central issue of student assignment, *Swann* left school authorities and lower courts confronted with a serious dilemma — how to reconcile the language pertaining to racial balance or quotas with the language concerning the elimination of every all-Negro and all-white school. The Court of Appeals seized upon one problem area, the number of one-race schools, and elevated it to the controlling factor to resolve the "no racial balance or quota — elimination of one-race schools" dilemma. This was done to accommodate the Respondent-NAACP demand for racial balance. The Court below in effect erroneously construed *Swann* to require that every one-race school must be eliminated. One-race schools cannot be eliminated, and are not required to be eliminated, in this large urban school system given the facts of this case. *Swann*'s comment that school authorities and district judges will necessarily be concerned with the elimination of one-race schools should not be read to require that every one-race school *must* be eliminated or to require findings to justify one-race schools. None of *Swann*'s language addressing that concern can be so construed. Contrary to *Swann*, the Court of Appeals has developed a "per se rule" and made the elimination of all one-race schools the controlling factor to be considered in determining whether a remedy is consistent with the Equal Protection Clause and this Court's decisions in *Swann* and *Milliken II*. The one-race school

criteria seized upon by the Court of Appeals is an example of how *Green v. New Kent County* thinking can bring lower courts to an erroneous interpretation of *Swann* in cases involving large urban school systems. A national educational crisis exists in large urban school systems because some federal courts refuse to admit that *Swann* must be interpreted in light of the urban condition as it exists in these school systems. The District Court was one federal court that did recognize this fact. New and innovative approaches are appropriate in desegregation matters — ". . . in this field the way must always be left open for experimentation." *United States v. Montgomery County Board of Education*, 395 U.S. 225, 235 (1969). Otherwise the judicial goal of a plan that promises realistically to work now in such school systems will not be reached.

B. The District Court's Final Order should be affirmed in its entirety: Respondent-Plaintiffs' attorneys in seeking and receiving an award of attorneys' fees have admitted that the District Court's Final Order affords Black and Mexican-American students the relief sought. The lead counsel for Respondent-NAACP has publicly conceded that Respondent-NAACP does not know how to eliminate certain all-black schools in the School District.

C. The Court of Appeals' concern with the absence of time and distance studies was unwarranted. The District Court was fully aware of the realities of time and distance. Given the evidence in the record of

demographic housing patterns and changes, the widely separated location of predominantly Anglo students and predominantly minority students, the location of naturally integrated neighborhoods, and the testimony of certain witnesses, the District Court had no need to be concerned with formal time and distance studies. No formal detailed time and distance studies were offered by any party. If the District Court and the parties considered that this case could be decided on the evidence without such studies, then surely the Court of Appeals should have been able to do so. The Court of Appeals' concern for the absence of time and distance studies is but further evidence that the Court of Appeals interprets *Swann* to require that every one-race school must be eliminated.

D. "Vestiges" as used by the District Court in both 1971 and 1976 was employed in the sense of a "trace of something formerly present," i.e., that which had once existed but has passed away or disappeared. The dual system was no more. Only its trace must now be removed from the system. Here the District Court has found only a limited constitutional violation exists — a trace of a former dual system. It is this trace of something formerly present with which we are now concerned. The District Court formulated a plan to remedy only these "vestiges" without exceeding the District Court's equitable powers and responsibility to balance public and private needs. A drastic remedy contemplated by the Court of Appeals with its emphasis on the elimination of all one-race schools is not required or

permitted in this case in order to remove this trace of something formerly present. The judicial task is to correct the condition that offends the Constitution. The District Court's Final Order meets this standard.

E. The District Court correctly refused to follow Respondent-NAACP's "single-minded commitment to racial balance." Recognizing all the complex factors involved, the District Court anticipated the subsequent June 27, 1977, decision of this Court in *Milliken II* and properly considered education-oriented alternatives. The decision of the Court of Appeals does not refer to this Court's opinion in *Milliken II*. Thus the decision of the Court of Appeals in effect interprets *Swann* to mean that the non-student assignment provisions contained in the remedial order in question, including remedial educational programs, are not to be considered as desegregation tools or techniques. The Court of Appeals has made too limited a reading of *Swann* in the light of this Court's decision in *Milliken II*.

F. The Court of Appeals has looked with approval upon the fact that district courts have appointed biracial committees to study and make recommendations for school desegregation plans. *Jones v. Caddo Parish School Board*, 487 F.2d 1275, 1276, 1277 (5th Cir. 1973). While the tri-ethnic committee involved here might not have been initially appointed to render this service, the background, origin and development of the District Court's Final Order is tantamount to initial appointment of a tri-ethnic committee to study and make rec-

ommendations. The District Court's Final Order has considerable support in the community among both Anglo and minority citizens. That support is evident from the vote in favor of the $80,000,000.00 school improvement bond issue at the election held on December 11, 1976. That bond election carried in Black precincts such as the East Oak Cliff area and in South Dallas.

G. *Swann* is to be interpreted in light of the urban condition present in school systems such as Dallas. Unless the District Court's realistic approach to such a school system is affirmed by this Court, desegregation litigation involving these school systems will go on and on over the years and will end only when such school systems become virtually all-black or virtually all-black and Mexican-American. Given the origin and development of the District Court's Final Order and the facts of this case, this is a school desegregation case in which the District Court's Final Order should be approved and affirmed in its entirety and over twenty-four years of litigation brought to a conclusion.

ARGUMENT

Among the issues before the Courts below was the constitutionality of the remedy formulated by the District Court to eliminate the vestiges of a state-imposed dual school system in a large urban school system. In particular a system that is now *minority Anglo*, with an ever decreasing percentage of Anglo students, that now requires a tri-ethnic remedy and which has been

the object of ongoing litigation to formulate a remedy since *Brown II*. It is obvious from the directions given the District Court on remand that the Court of Appeals considered the number of one-race schools to be the controlling criteria for determining the appropriateness of a remedy for such school systems. That is not what this Court said concerning one-race schools in *Swann*. That is not what this Court in effect construed *Swann* to mean in *Milliken II*.

Here, as in *Swann*, the central issue is that of student assignment. *Swann* addressed four specific problem areas with respect to this central issue: (1) racial balance or racial quotas, (2) one-race schools, (3) remedial altering of attendance zones, and (4) transportation of students. (402 U.S. at 22)

However, in addressing those four problems, the Court left school authorities and lower courts confronted with a serious dilemma — how to reconcile *Swann*'s language pertaining to racial balance or racial quotas with *Swann*'s language concerning the elimination of every all-Negro and all-white school.

The District Court sought to articulate this dilemma in its March 10, 1976, Opinion and Order: (Estes Pet. App. "B", 9a, 10a)

> "In adopting a student assignment plan, this Court is required to arrive at a delicate balance — the dual nature of the system must be elim-

inated; however, a quota system cannot be imposed. The Supreme Court ruled in *Swann*, supra at 26, that

> [t]he district judge or school authorities should make every possible effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with *the elimination of one-race schools.*

"On the other hand, the Supreme Court held that

> [t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the *racial composition of the school system as a whole.*" (Emphasis ours)

The Court of Appeals seized upon one of the problem areas addressed by *Swann*, to wit, the number of one-race schools, and elevated that one problem area to the controlling factor. Elevation of the one-race school problem area to that of primary importance is the means by which the Court of Appeals has resolved this dilemma posed by *Swann*'s language.

The "no racial balance or quota - elimination of one-race schools" dilemma of *Swann* leads courts such as the Court below to attempt desegregation through racial balance by focusing on the elimination of one-race

schools as the controlling factor to be considered in determining whether a remedy is consistent with the Equal Protection Clause and this Court's decisions.

In *Keyes v. School District No. 1*, 413 U.S. 189, 200 (1973), this Court pointed out that it has never suggested that plaintiffs must bear the burden of proving de jure segregation as to each and every school or student. The Court of Appeals by its requirement for findings to justify one-race schools has erroneously directed judicial efforts at a remedy toward the individual school rather than school systems.

Unless the District Court orders a racial balance plan, the Court of Appeals may well continue to remand this case until there is finally ordered a plan which eliminates all one-race schools through the use of racial balance or quotas. In doing so the Court below must of necessity ignore facts present in this school system and this Court's holding in *Milliken II*.

Lower court interpretations of *Swann*, as in the Court of Appeals, create such uncertainties with respect to school systems such as Dallas that nothing is resolved. Such lower court readings of *Swann* create such unfortunate social and economic circumstances in metropolitan cities that the results have become a national educational tragedy. All that now occurs under *Swann* with respect to school systems such as Dallas is constant district court hearings, appeals and remands. The District Court had a solution for a

national problem. The Court of Appeals rejected this solution. The decision of the Court of Appeals should be reversed. The decision of the District Court should be affirmed.

In Point I of this brief the School District shall show that the decision of the Court of Appeals is in conflict with this Court's decisions in *Swann* and *Milliken II*. In Point II the School District will discuss the origin of the District Court's Final Order, the need for further word from this Court and why the District Court's Final Order should be affirmed in its entirety.

I.

The Elimination Of All One-Race Schools Is Not The Controlling Factor To Be Considered In Determining Whether The Remedy Formulated By The District Court Is Consistent With The Equal Protection Clause And This Court's Decisions in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, And *Milliken v. Bradley*, 433 U.S. 267 (*Milliken II*).

The Court Of Appeals Has Misconstrued Swann's *Holding With Respect To The Central Issue Of Student Assignment And In Particular* Swann's *Language Concerning The Specific Problem Area Of One-Race Schools.*

Swann states the question to be: (402 U.S. at 22)

> "(2) whether every all-Negro and all-white school *must* be eliminated as an indispensable part of a remedial process of desegregation;" (Emphasis ours)

Swann does not require that every one-race school *must* be eliminated as an indispensable part of the remedy. But in an apparent effort to judicially sanction the Respondent-NAACP demand for racial balance, the Court below in effect construed *Swann* to require that every one-race school *must* be eliminated as an indispensable part of the remedy. Otherwise there would be no need on remand for District Court findings to justify the maintenance of any one-race schools, as was so pointedly required by the Court of Appeals.

In speaking of the "violation" phase of school desegregation proceedings, this Court in *Washington v. Davis*, 426 U.S. 229, 240 (1976), made clear, "That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." But as to the "remedy" phase of school desegregation litigation, the Court below was not disposed to permit one-race schools, even given the facts of this case and the special conditions that exist in this large urban school district.

If the existence of predominantly black and predominantly white schools in a community is not alone a violation of the Equal Protection Clause; then the elim-

ination of all one-race schools should not be the controlling factor in determining whether a remedy is consistent with the Equal Protection Clause and this Court's decisions. If such were the case, then the elimination of all one-race schools as such a remedy would be directly contrary to this Court's oft-repeated language in school desegregation cases that the nature of the violation determines the scope of the remedy. (*Swann*, 402 U.S. at 16)

If racial balance or racial quotas are not to be used as an implement in a remedial order, then one-race schools cannot be eliminated in this large urban school system given the demographic phenomena present here. As recognized by this Court in *Swann*, in metropolitan areas minority groups are often found concentrated in one part of the city. (402 U.S. at 25) Such is the case in this School District. But also to be considered here is the location within the School District of naturally integrated areas and schools in relation to the areas containing the remaining predominantly Anglo students and the areas containing predominantly Mexican-American or Black students. The predominantly Mexican-American or Black students reside to the south and southeast in areas distant from the predominantly Anglo students. Separating the remaining predominantly Anglo students and the predominantly Mexican-American or Black students are large portions of the naturally integrated areas and schools. (Maps, Def. Exs. 1, 2 and 3; App., 219, 220, 221)

Nor is the school system required to make continual changes in a mobile society. Change in neighborhood patterns caused by citizens themselves can bring about a desired result as shown by the Court's thinking in *Swann*. (402 U.S. at 25) School systems may rely in part upon their patrons moving about and upon changing neighborhood patterns to eliminate schools of one race. Certainly this has been the solution in many areas of the School District where schools previously serving all-white neighborhoods have become mixed through population changes brought about by changes in neighborhood residential patterns.

Changes in neighborhood residential patterns have in many instances brought about the very number of one-race schools of concern to the Court of Appeals. *Swann* does not hold such school systems responsible for the effect of these changing neighborhood patterns. (402 U.S. at 31) The School District serves a community that is not demographically stable. The School District serves a growing, mobile society in this nation.

At the time of filing of the instant action on October 6, 1970, the School District had operated and conducted its schools since September 1, 1965, pursuant and obedient to a plan of desegregation ordered and directed by the District Court and the Court of Appeals in a prior, pending desegregation proceeding. Any "long history" of the School District in maintaining two sets of schools — one for white and one for black —

came to a complete end on September 1, 1967, as authorized by those Courts in such prior proceeding.

In ordering the racially desegregated single attendance districts within the School District in such prior proceeding, the District Court and the Court of Appeals recognized, authorized and permitted neighborhood schools. This was the culmination of the Black student's struggle to attend the desired one and only neighborhood school serving his place of residence. There was no interference with that struggle by the School District through free transfer or freedom of choice or any other scheme or device. If neighborhood residential patterns reflect schools in the School District in which one race predominates, such a condition results from housing selections made by school patrons after the School District complied with orders of the District Court and the Court of Appeals creating and requiring racially desegregated single attendance districts and not otherwise.[3] In the instant case, close scrutiny by the District Court has determined that school assignments are not part of state enforced segregation. (402 U.S. at 26)

Swann's comment that school authorities and district judges will necessarily be concerned with the elimination of one-race schools (402 U.S. at 26) should not be read to require that every one-race school *must* be

3 The School District is cognizant of this Court's observation on "step at a time" plans. *Cf. Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 435, citing *United States v. Montgomery County Board of Education*, 395 U.S. 225.

eliminated or to require findings to justify one-race schools. None of *Swann*'s language addressing that concern can be so construed.

In addressing the matter of concern as to the elimination of one-race schools, *Swann* recognized that "no per se rule can adequately embrace all the difficulties." (402 U.S. at 26) However, the Court of Appeals has developed a "per se rule" and made it the controlling factor. This is evident from the fact that out of the four problem areas addressed by this Court in *Swann*, the Court of Appeals did not require the District Court to make *specific findings* except in one instance — to justify the number of one-race schools.

Nowhere does *Swann* in its discussion of one-race schools require findings to justify one-race schools with respect to this concern. At most *Swann* indicates that the need for remedial criteria of sufficient specificity warrants a presumption against schools that are substantially disproportionate in their racial composition. (402 U.S. at 26) A need that warrants a presumption is not a requirement that every one-race school must be eliminated. The existence of a presumption is not a requirement for findings to justify one-race schools.

Here the burden of showing that school assignments made in the remedy in question are genuinely nondiscriminatory has been met. As required by *Swann*, the District Court has carefully scrutinized the matter of one-race schools. The burden to satisfy the District

Court that the racial composition of schools is not the result of present or past discriminatory action on the part of school authorities has been successfully met to the satisfaction of the District Court.

The one-race school criteria seized upon by the Court of Appeals is an example of how *Green v. New Kent County*[4] thinking can bring lower courts to an erroneous interpretation of *Swann* in cases involving large urban school systems. In the instant case we are dealing with a system of some 800,000 to 900,000 persons, operating some 183 school buildings with approximately 140,000 students of whom 41.1% were Anglo, 44.5% were Black and 13.4% were Mexican-American. In *Green* the school system operated only two schools in a rural county of some 4,500 population. One was a white combined elementary and high school and one was a Negro combined elementary and high school. The school system served approximately 1,300 pupils, 740 of whom were Negro and 550 of whom were white. Facts and conditions are not the same. It is one thing to think in terms of no one-race schools in New Kent County, Virginia, with only two schools in that entire rural system, but focusing on such an overly simplistic approach in considering a remedy for this large urban system has brought the Court below to an erroneous construction of *Swann* and to a decision in conflict with *Swann* when read in its entirety.

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4 *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

A national educational crisis exists in large urban school systems because some federal courts refuse to come to grips with the fact that *Swann* must be interpreted in light of the urban condition as it exists in these school systems. The District Court was one federal court that did recognize that *Swann* must be interpreted in light of the urban condition in such school systems. The District Court's March 10, 1976, Opinion and Order well states the anguish and agony that district courts must go through in formulating remedies in such school systems. In the District Court's language in part:

> "In this complex and ever-changing area of the law, it is difficult if not impossible to discover hard and fast rules for the Court to follow." (Estes Pet. App. "B", 7a)
>
> * * *
>
> ". . . school districts are like fingerprints — each one is unique. Although the goal of a unitary, non-racial system is a constant, the method or plan for achieving that goal must be tailored to fit the particular school district involved. A plan that is successful in a district having a small student population or occupying a small area geographically, a rural district, a county-wide district, or a majority Anglo school district, will not necessarily be successful in a large urban district such as the DISD." (Estes Pet. App. "B", 8a)

This Court has recognized that new and innovative approaches are appropriate in desegregation matters — ". . . in this field the way must always be left open for experimentation." *United States v. Montgomery County Board of Education*, 395 U.S. 225, 235 (1969). Granted that the judicial goal must be the development of a decree that promises realistically to work and promises realistically to work now, it nevertheless defies all logic and common sense to refuse to allow a district court to choose a plan that takes into account the urban condition in such school systems. Otherwise the judicial goal of a plan that promises realistically to work now in such school systems is reduced to a shambles.

Stripped of all desegregation rhetoric, the decision of the Court of Appeals is an erroneous effort to require the District Court to order racial balance in each school. This is the very solution sought by Respondent-NAACP as made abundantly clear in its desegregation plan filed with the District Court. The requirement of racial balance has been pointedly rejected by this Court. *Swann*, 402 U.S. at 24; *Milliken v. Bradley*, 418 U.S. 717, 740, 741 (1974).

This Court is urged to make known to the nation's lower courts that the discussion in *Swann* of one-race schools while addressing four specific problem areas with respect to student assignment is not to be construed in such a way as to indirectly achieve that which is not required, to wit, racial balance.

Actions And Admissions Of The Respondent-Plaintiffs And The Respondent-NAACP Are Contrary To The One-Race School Criteria Seized Upon By The Court Of Appeals.

Both the District Court and the Court of Appeals have recognized Respondent-Plaintiffs as representative of the class of Black and Mexican-American students in the School District.

Both of Respondent-Plaintiffs' plans have been abandoned by Respondent-Plaintiffs in this action. Respondent-Plaintiffs' attorneys in seeking an award of attorneys' fees have admitted that the District Court's Final Order affords Black and Mexican-American students the relief sought.

The lead counsel for Respondent-NAACP has admitted publicly that Respondent-NAACP does not know how to eliminate certain all-black schools in the School District. If, in the words of Respondent-NAACP's counsel, the Respondent-NAACP has ". . . not yet come up with an alternative to some all-black schools," then the Court of Appeals should not read *Swann* to require the District Court to be wiser than Respondent-NAACP.

Neither Respondent-Plaintiffs nor Respondent-NAACP should be heard to urge on behalf of Black students a remand to the District Court for the formulation of a new student assignment plan and for find-

ings to justify the maintenance of any one-race schools that may be a part of that plan as ordered by the Court of Appeals. Both the School District and the Courts should be spared the constant litigation that of necessity results when separate litigants representing members of the same alleged class of students cannot agree upon the nature and propriety of the relief obtained in a school desegregation proceeding.

Actions and admissions of Respondent-Plaintiffs and Respondent-NAACP do not support the "one race school remand" of the Court of Appeals. The Court of Appeals had no need or justification on this record to promulgate its own "per se rule" as to the number of one-race schools in order to remand.

Time And Distance Studies Were Not Necessary.

The Court of Appeals' concern for the absence of time and distance studies in the record and the consequences of such absence is unnecessary under the particular facts of this case. The Court of Appeals has erroneously assumed that the District Court was completely unaware of the realities of time and distance. In fact, however, the District Court was well aware of the realities of time and distance. In setting forth its student assignment criteria within subdistricts, the District Court states, "8. Transportation distance and time are minimized to the extent possible." (Estes Pet. App. "B", 56a, 57a)

Given the evidence in the record of demographic housing patterns and changes, the widely separated location of predominantly Anglo students and predominantly minority students, the location of naturally integrated neighborhoods, and the testimony of the witnesses, Dr. Charles V. Willie, Mr. Edward B. Cloutman, III, and Dr. Paul Geisel, the District Court had no need to be concerned with formal time and distance studies nor should the Court of Appeals have been concerned with formal time and distance studies under the record in this case.

Formal time and distance studies would have only encumbered the record. There was no need to formally summarize the obvious. The obvious was certainly recognized by Respondent-Plaintiffs as to East Oak Cliff in the thrice repeated language of their own — but now abandoned — Plan B and by the testimony of their own attorney-witness, Mr. Edward B. Cloutman, III, given in explanation of that language.

The fact that no formal detailed time and distance studies were offered by any party should indicate that such studies were not required in this particular school desegregation case.

For the Court of Appeals to become overly concerned by the absence of formal time and distance studies which neither the District Court nor any party considered necessary is but further example that the Court of Appeals considered the number of one-race

schools to be the controlling criteria for determining the appropriateness of the remedy formulated by the District Court. If the District Court and the parties considered that this case could be decided on the evidence without such studies, then surely the Court of Appeals should have been able to do so.

Elimination Of All One-Race Schools Cannot Be The Controlling Factor When The District Court Is Formulating A Remedy To Eliminate The Vestiges Only Of A State-Imposed Dual System.

Cases such as this represent one of the great judicial fictions of our time. Since August of 1971, this School District has been operating under United States District Court "statute or constitution," i.e., desegregation remedies — including student assignment provisions — ordered by a federal court. Regardless of whether those remedies have survived Court of Appeals review, this United States District Court "law" has governed large parts of this School District's operations since the 1971-1972 school year. This many years after *Brown I* there is no way to unscramble the so-called "vestiges" of a dual system imposed by state "law" from the "vestiges" of United States District Court "law". To pretend otherwise is pure fiction. At least the District Court has sought to be intellectually honest in its approach.

In its March 10, 1976, Opinion and Order the District Court explained that in the present case we are in-

volved only with "vestiges" of a state-imposed dual system and went on to point out that its findings in 1971 were that the "vestiges" of a dual system remained; not that the School District was a dual system in 1971. In the District Court's language: (Estes Pet. App. "B", 12a)

> "This Court has kept in mind throughout these proceedings that its findings in 1971 were that the 'vestiges' of a dual school system remained in the DISD, and not that the DISD was a dual system at that time. The plan adopted now must therefore remedy these vestiges without exceeding this Court's equitable powers to balance public and private needs."

"Vestiges" as used by the District Court in both 1971 and 1976 was employed in the sense of a "trace of something formerly present," (*Webster's Third New International Dictionary*, G. & C. Merriam Company, Publishers, Springfield, Massachusetts, 1971, p. 2547), i.e., that which had once existed but has passed away or disappeared. The dual system was no more.[5] Only its trace must now be removed from the system.

Nowhere does the Court of Appeals question the findings and explanation made by the District Court in

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5 Accordingly, the District Court's finding in its July 16, 1971, Memorandum Opinion that elements of a dual system still remain (Brinegar Pet. App. A, A-2) is not to be read as a holding that the School District was a dual system in whole or in part in 1971.

this regard, or acknowledge that it is only the most limited of constitutional violations — a trace — which is to be remedied in the School District.

The District Court did not have before it a stubborn obstinate southern school system untouched by judicial hands or unaware of its responsibilities to operate a unitary system. The most that the District Court found in 1971 was a trace of something formerly present. A drastic remedy is not required. The judicial task is to correct the condition that offends the Constitution. The student assignment plan contained in the District Court's Final Order meets this standard. This Court has sought to make clear to the lower courts the very important principle of equity jurisprudence that the scope of the remedy is determined by the nature and extent of the constitutional violation.

The District Court has recognized the strides that the School District has made to provide equal educational opportunity for all and is aware of the results of natural changes in residential patterns over the years. (Estes Pet. App. "B", 14a-18a)

Without doubt this Court in *Swann* sought to make known to the lower courts that there should be an end to a desegregation case. Otherwise, there would have been no necessity for this Court to speak of "the interim period" when remedial adjustments in attendance zones are being made to eliminate dual school systems. (402 U.S. at 28) Use of the word "interim"

suggests a temporary period in the federal court house; not a permanent state of litigation. Further, there would have been no necessity for this Court in *Swann* to recognize that at some point school systems would be "unitary" even in a growing mobile society and to specifically hold that neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. *Swann*, 402 U.S. at 31, 32; *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976)

Here the District Court has found only a limited constitutional violation exists — a trace of a former dual system. It is this trace of something formerly present with which we are now dealing in the School District. The District Court formulated a plan to remedy only these "vestiges" without exceeding the District Court's equitable powers and responsibility to balance public and private needs. A drastic remedy contemplated by the Court of Appeals with its emphasis on the elimination of all one-race schools is not required or permitted in this case in order to remove this trace of something formerly present.

The Court Of Appeals Should Have Considered And Determined The Non-Student Assignment Provisions Of The Remedy Formulated By The District Court As Appropriate Tools Or Techniques Of Desegregation

Consistent With The Equal Protection Clause And This Court's Decision In Milliken II.

In *Milliken II*, this Court determined that the four educational components which had been ordered by the District Court for Detroit and were at issue before this Court were tools or techniques of desegregation. These educational components *prospectively* were designed to wipe out conditions of inequality produced by a dual school system and to bring about the delayed benefits of a unitary system. (433 U.S. at 290)

The decision of the Court of Appeals does not refer to this Court's opinion in *Milliken II*. Thus the decision below in effect interprets *Swann* to mean that the non-student assignment provisions contained in the remedial order in question, including remedial educational programs, are not to be considered as desegregation tools or techniques. The Court of Appeals has made too limited a reading of *Swann* in the light of this Court's decision in *Milliken II*. Contrary to *Milliken II*, the Court of Appeals has decided that certain remedial educational programs may not be considered as desegregation tools or techniques.[6]

The Judge of the District Court has presided in this case from the beginning. From its March 10, 1976,

6 The School District approves of the Court of Appeals' handling on remand of the non-student assignment portions of the Final Order under review. Such an approach was fair, just and appropriate on remand in view of the School District's admittedly unique position in this appeal as noted by the Court of Appeals in footnote 8 of the decision. (Estes Pet. App. "C", 135a)

Opinion and Order it is obvious that the District Court has a thorough knowledge of the School District and has recognized and considered student ethnic composition, housing patterns, geography, time, distance, natural boundaries, traffic considerations, "practicalities," age, health and safety of students, equal educational opportunity, and all other factors involved in applying techniques for desegregation.

Consequently the District Court could not help but realize that the location of naturally integrated neighborhoods and the widely separated residential locations of Anglo students and minority students would not permit effective additional pairing and clustering or new attendance zones and that the widely separated location of Anglo students and minority students considered in the light of time and distance, natural boundaries, traffic considerations and other factors together with the minority Anglo composition of the School District's students dictated against the feasibility of additional transportation.

But the District Court did not let such obstacles stop its efforts to fashion an appropriate remedy. Recognizing all the complex factors involved, and over the strenuous objections of the School District, the District Court anticipated the subsequent June 27, 1977, decision of this Court in *Milliken II* and included the non-student assignment provisions in its remedial order.

In *Milliken II* (footnote 3, 433 U.S. at 271), this Court took note of the fact that of the total Detroit student

population 71.5% were Negro and 26.4% were white and the remaining 2.1% were comprised of students of other ethnic groups. In Dallas, as in Detroit, the District Court had to deal with the realities of a minority Anglo school system.

The rationale for affirmance of the District Court's Final Order in its entirety is to be found in *Integration Ideals and Client Interests*, 85 Yale L.J. 470 (March, 1976)[7] Professor Bell presents an effective argument as to why the traditional NAACP approach to racial balance and busing in large predominantly minority school systems will not work and is self-defeating. The author suggests that the time has come for the NAACP to end its "single-minded commitment to racial balance" and consider education-oriented alternatives. He argues that the courts can properly afford that relief in remedial orders. In the author's language:

> "In the last analysis, blacks must provide an enforcement mechanism that will give educational content to the constitutional right recognized in *Brown*. Simply placing black children in 'white' schools will seldom suffice. Lawyers in school cases who fail to obtain judicial relief that reasonably promises to improve the education of black children serve poorly both their clients and their cause." Bell, at 514, 515.

7 The article identifies the author, Derrick A. Bell, Jr., as a Professor of Law at Harvard University who from 1960 to 1966 was a staff attorney specializing in school desegregation cases with the NAACP Legal Defense Fund and from 1966 to 1968 was Deputy Director, Office for Civil Rights, U.S. Department of Health, Education and Welfare.

* * *

"But civil rights groups refuse to recognize what courts in Boston, Detroit, and Atlanta have now made obvious: where racial balance is not feasible because of population concentrations, political boundaries, or even educational considerations, there is adequate legal precedent for court-ordered remedies that emphasize educational improvement rather than racial balance." Bell, at 487.

* * *

"Conclusion

"The tactics that worked for civil rights lawyers in the first decade of school desegregation — the careful selection and filing of class action suits seeking standardized relief in accordance with set, uncompromising national goals — are no longer unfailingly effective. In recent years, the relief sought and obtained in these suits has helped to precipitate a rise in militant white opposition and has seriously eroded carefully cultivated judicial support. Opposition to any civil rights program can be expected, but the hoped-for improvement in schooling for black children that might have justified the sacrifice and risk has proven minimal at best. It has

been virtually nonexistent for the great mass of urban black children locked in all-black schools, many of which are today as separate and unequal as they were before 1954.

"Political, economic, and social conditions have contributed to the loss of school desegregation momentum; but to the extent that civil rights lawyers have not recognized the shift of black parental priorities, they have sacrificed opportunities to negotiate with school boards and petition courts for the judicially enforceable educational improvements which all parents seek. The time has come for civil rights lawyers to end their single-minded commitment to racial balance, a goal which, standing alone, is increasingly inaccessible and all too often educationally impotent." Bell, at 515, 516.

The District Court refused to follow a "single-minded commitment to racial balance." The District Court has accepted the concept that the Fourteenth Amendment permits remedial educational programs to be used as desegregation tools or techniques. On the other hand, the Court of Appeals by its refusal to even refer to or discuss this Court's decision in *Milliken II* has made known to school authorities and district courts that it rejects this concept under the facts of this large urban school system. By its remand the Court of Appeals demonstrated that it considers racial balance to be the only solution in large urban school systems,

regardless of the facts and circumstances in any given large urban school system.

II.

Why The District Court's Final Order Should Be Affirmed In Its Entirety.

The District Court's Final Order represents a concept and recommendation arrived at by a tri-ethnic group of citizens. The Court of Appeals views such a procedure favorably and has looked with approval upon the fact that district courts have appointed bi-racial committees to study and make recommendations for school desegregation plans. *Jones v. Caddo Parish School Board*, 487 F.2d 1275, 1276, 1277 (5th Cir. 1973). While in Dallas this tri-ethnic group might not have been initially appointed to render this service, the background, origin and development of the District Court's Final Order is tantamount to initial appoint of a tri-ethnic committee to study and make recommendations.

The District Court's Final Order represents a compromise negotiated by a tri-ethnic group of citizens with the District Court's approval. That compromise involves both student assignment and non-student assignment provisions. No Respondent should be heard to complain of only the part with which he does not agree (the student assignment plan) and yet seek to retain the benefits of the part of which he approves and desires to have imposed on the School District (the

non-student assignment provisions). The two parts together constitute the District Court's total and complete remedy. The District Court's Final Order should not be approached on the basis that the student assignment provisions should be reversed and the non-student assignment provisions left standing.

The District Court's Final Order has considerable support in the community among both Anglo and minority citizens. That support is evident from the vote in favor of the $80,000,000.00 school improvement bond issue at the election held on December 11, 1976, following implementation of the District Court's Final Order with the opening of the 1976-77 school year the preceding August. That bond election carried in Black precincts such as the East Oak Cliff area and in South Dallas. Unhappy school patrons — be they Anglo, Black or Mexican-American — are not known to vote in favor of school improvement bonds. This is particularly the case where the public is antagonistic toward a school desegregation remedy imposed by the courts.

If desegregated school systems in large urban metropolitan centers are the true goal, then that objective becomes an impossibility when public education is required to exist under conditions that do not appeal to many school patrons. The constant uncertainty and pressure of endless school desegregation litigation is such a condition; as is the resulting prospect of ever expanding busing in a large metropolitan area. Faced with this predicament, parents seek a more satisfactory

state of affairs elsewhere; some in the suburbs, some in private or church-related schools. Their search is not always related to a racial bias but to their sense of frustration with a situation that decreases the total educational opportunity for their child. Uncertainty destroys parents' patience and confidence. It is not just Anglos who become dissatisfied with these adverse circumstances in urban school districts. Black families and Mexican-American families value education also; and they will avoid these conditions as they can, just as Anglos do when they can.

Mr. Justice Marshall observed in his dissent in *Milliken I*, 418 U.S. at 801, that this Court in *Wright v. Council of the City of Emporia*, 407 U.S. 451, 464 (1972), took the possibility of white flight into account in evaluating the effectiveness of a desegregation plan. Perhaps it is time to think in terms of "upper and middle class flight" and to take that possibility into account in evaluating the effectiveness of a desegregation plan. Upper and middle class flight by people of all ethnic origins involves more than movement out of a given school system. Once a promotion or change in employment occurs and a family moves from one locality to another, there is reluctance to move into a particular school system known to be in constant desegregation litigation.[8]

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8 The argument here made pertains to demographic changes that are the result of the constant uncertainty and unrelenting pressure of never ending school desegregation litigation. The argument here made does not refer to "white flight" or any other "flight" traceable to the requirements and provisions of a desegregation decree. *Cf. Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 435.

The School District is cognizant of the Court of Appeals' earlier 1975 observations that the School District is no stranger to school desegregation proceedings. The School District earnestly seeks to become a stranger to school desegregation proceedings. The School District accepts the District Court's Final Order in its entirety. Given the origin and development of the District Court's Final Order and the facts of this case, this is a school desegregation case in which the District Court's Final Order should be approved and affirmed in its entirety and over twenty-four years of litigation brought to a conclusion.

To this end it should be made clear to the lower courts that *Swann* is to be interpreted in light of the urban condition present in school systems such as Dallas. Unless the District Court's realistic approach to such a school system is affirmed by this Court, desegregation litigation involving these school systems will go on and on over the years and will end only when such school systems become virtually all-black or virtually all-black and Mexican-American. Unitary these school systems may then be, but virtually all-black or all-black and Mexican-American they will be also.

If in the urban condition Blacks, Anglos and Mexican-Americans are to establish a harmonious, peaceful and civilized existence based upon a school desegregation plan that "works," then new and innovative approaches are required of school authorities and courts with respect to remedies to eliminate the

vestiges of a state-imposed dual school system in large urban school systems. Not only that, but there must be some hope that ever pending desegregation litigation will at some time come to a final and conclusive end, so that the uncertainty and turmoil over student assignment plans will leave center stage to the educational process.

Further word from this Court is needed to once and for all make known that *Swann*'s language pertaining to the elimination of all one-race schools is not to be used as a subterfuge to cause racial balance to become the only acceptable remedy.

In order to eliminate the vestiges of a state-imposed dual school system in the large urban school system here involved — and contrary to the decision of the Court of Appeals — the elimination of all one-race schools is not the controlling factor to be considered in determining whether a remedy formulated by the District Court is consistent with the Equal Protection Clause and this Court's decisions in *Swann* and *Milliken II*.

CONCLUSION

The judgment of the Court of Appeals, insofar as it remanded the case to the District Court for the formulation of a new student assignment plan for the Dallas Independent School District and for findings to justify the maintenance of any one-race schools that may be a

part of that plan, should be reversed and the District Court's Final Order should be approved and affirmed in its entirety by this Court.

Respectfully submitted,

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May 1979

PROOF OF SERVICE

We, Warren Whitham and Mark Martin, Attorneys for Petitioners herein, and members of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1979, we served three copies of the foregoing Brief for the Petitioners upon the following Counsel for Respondents:

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We further certify that all parties required to be served have been served.

_____

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_____

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